Petition

81-215

No. _____

Office-Supreme Court, U.S.
FILED
JUL 30 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SUSAN JUNE AVERY,

Petitioner,

v.

STATE OF MARYLAND
and
LIEUTENANT E. L. RECTOR
HARFORD COUNTY DETENTION CENTER,

Appellees.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STEPHEN L. MILES
Suite 1710
36 South Charles Street
Baltimore, Maryland 21201
Telephone: (301) 685-8444
Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1) Was Appellant denied the proper Appellate review requisite in a case involving the Constitutional issue of obscenity?

2) Was Appellant's Sixth Amendment Constitutional right to obtain and present witnesses on her own behalf and her Fourteenth Amendment Right to due process abridged and violated?

3) Was Appellant's First Amendment Constitutional right to freedom of expression violated?

4) Is expert testimony necessary in order for there to be a valid criminal conviction for violation of Aberdeen Ordinance No. 248 (Harford County of Maryland) restricting freedom of expression through dancing?

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NO. _____

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM, 1981

SUSAN JUNE AVERY

Petitioner

v.

STATE OF MARYLAND
and
LIEUTENANT E.L. RECTOR
HARFORD COUNTY DETENTION CENTER

Appellees

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Susan June Avery, prays that a Writ of Certiorari issue to review the Judgment by the United States Court of Appeals for the Fourth Circuit entered June 11, 1981 and the decision of the United States District Court for the District of Maryland

entered on November 11, 1980.

OPINIONS BELOW

The State trial court (Jury) did not render a written opinion in this case. The judgment of conviction in the trial court was entered on May 16, 1979 and was known as Cr. App. No. 1418 - Circuit Court for Harford County.

A Petition for Certiorari was filed in the Court of Appeals of Maryland which was known as docket number 114 - September Term, 1979, requesting a review of the State Court conviction. This was denied on June 22, 1979 and no written opinion was given.

A Petition for Writ of Habeas Corpus was filed in the United States District Court for the District of Maryland known as civil number JH-79-1342. The Order of Judge Joseph C. Howard denying said Writ was issued on November 17, 1980.

The opinion of the United States District Court for the Fourth Circuit (Unpublished) is reflected in the Appendix.

Number 81-6139 - Decided June 11, 1981.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fourth Circuit affirming the United States District Court for the District of Maryland at Baltimore was entered on June 11, 1981.

This Petition for a Writ of Certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S. C. § 1254 (1)

CONSTITUTIONAL PROVISIONS AND STATE ORDINANCE

CONSTITUTION OF THE UNITED STATES:

Amendment I

(Freedom of Religion, of Speech and of the Press)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment VI

(Right to Speedy Trial, Witnesses, etc.)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public

trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process of obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV

Section 1

(Citizenship Rights Not to Be Abridged by States)

All persons born or naturalized in the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATE ORDINANCE:

Aberdeen Ordinance 248 (Harford County Maryland)

An Ordinance defining obscene performances and prohibiting the same within the Town of Aberdeen as a misdemeanor and providing penalties for violations thereof.

SECTION I. Be It Resolved, Ordained, and Enacted by The Commissioners of Aberdeen that a new Ordinance be enacted to read as follows:

A. Definitions:

For the purpose of this Ordinance, an obscene performance, exhibition, drama, play, show, dancing exhibition, tableau or entertainment shall be defined as one which the average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest, and which taken as a whole, lacks serious literary, artistic, political, or scientific value, and where in a patently offensive way, it conveys to the observer sexual conduct:

(1) As specifically defined in any statute of Maryland proscribing obscenity or obscene performances, or

(2) As specifically defined as follows, whether actual or simulated:

Sexual or anal intercourse, masturbation fellatio, cunnilingus, or the fondling of the buttocks, anus, breasts, or genitalia of oneself or another, or sexual stimulation by means of contact with animals or inanimate objects; or urination or defecation. For the purposes of this Ordinance, "simulated" shall mean the representation of an activity by mimicry, gesture, or bodily movement in a manner that would clearly and unmistably convey to an average adult that such activity is intended to be represented thereby.

B. Offenses:

Any person who as actor, dancer, owner, manager, producer, director, or agent, or in any other capacity, prepares, gives, directs, presents, performs, or participates in any obscene performance, exhibition, drama, play, show, dancing exhibition, tableau, or entertainment in which live persons perform or participate in an obscene manner in the presence of any other person or persons who have paid a consideration of any type whatsoever to observe the exhibition or performance; and

Every owner, lessee, or manager of any theatre, garden, building, room, place or structure, who knowingly permits the same to be used for the purpose of any such exhibition as enumerated in this paragraph, or who assents to its use for any such purpose shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned as provided hereafter.

C. Penalty and Separate Offenses.

Any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction, be imprisoned not more than thirty (30) days or fined not more than one hundred dollars ($100.00), or be both imprisoned and fined.

Each occurrence of a violation of this ordinance in a separate twenty-four hour period shall be considered a separate violation and punished as such.

D. Separability.

If any section, subsection, sentence, clause, phrase, or portion of this ordinance or any particular application hereof is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion or application shall be deemed a separate, distinct, and independent provision and such holding shall not affect the validity of the remaining portions hereof.

SECTION II. Be It Further Resolved, Ordained, and Enacted by The Commissioners of Aberdeen that this Ordinance take effect immediately upon its passage.

Introduced: November 28, 1977

Date of Passage: November 28, 1977

ATTEST:

KENNETH L. VOLKART
Director of Admin.

THE COMMISSIONERS OF
ABERDEEN

By
WILLIAM B. HAUSE, Pres.

STATEMENT OF THE CASE

Petitioner, Susan June Avery, was convicted in the District Court of Maryland for Harford County in a Court Trial on or about April 10, 1978 of violating Local Ordinance number 248 by performing an obscene dance. Petitioner was sentenced to ten days in jail and fined One hundred Dollars ($100.00).

Subsequent to the above, the Petitioner appealed her case to the Circuit Court for Harford County Maryland and was retried in a case de novo before a jury and was convicted again on May 16, 1979. Petitioner again was sentenced to ten days in jail and fined one hundred dollars ($100.00).

At said trial, the state produced no expert testimony in their case and petitioner

was not allowed to produce such testimony of either an expert or lay witness with regards to community standards and/or any scientific worth of her performance.

A Petition for Certiorari was filed in the Court of Appeals of Maryland and was summarily denied on June 22, 1979.

A Petition for Writ of Habeas Corpus was filed in the United States District Court for the District of Maryland and said Writ was denied on November 17, 1980.

Petitioner thereafter appealed her case to the United States Court of Appeals for the Fourth Circuit and said appeal was denied on June 11, 1981.

REASONS FOR GRANTING THE WRIT

The decisions below should be reviewed because they are in conflict with other Federal Court of Appeals decisions.

In addition thereto, the decisions below have decided a federal question in a way in conflict with applicable decisions of this court.

I. PRIOR DECISIONS REQUIRE APPELLATE REVIEW OF THE FACTUAL BASIS FOR ANY CRIMINAL CONVICTION INVOLVING A RESTRICTION OF FIRST AMENDMENT RIGHTS.

The constitutionality of Aberdeen Local Ordinance No. 248 has never been decided in any Court other than the Circuit Court for Harford County and the District Court of Maryland located in Aberdeen, Maryland.

The fact that Appellate review should be mandatory was first alluded to in the case of Miller v. California, 413 U.S., 15 at page 25 (1973), wherein the Court stated:

"If a State Law that regulates obscene material is thus limited, as written or construed, the first Amendment values applicable to the States through the 14th Amendment, are adequately protected by the ultimate power of Appellate Courts to conduct an independent review of constitutional claims where necessary."

If there was any question with the opinion in Miller as to the requirement of Appellate

Courts to review obscenity standards as given by decisions in the lower Court, even when said questions were decided by a Jury involving questions of fact, these were laid aside in the case of Jenkins v. Georgia, 418 U.S., 153 (1974) at pages 163 and 164 where the Court stated:

"After the Court's decision today, there can be no doubt Miller requires Appellate Courts - including this Court - to review independently the constitutional fact of obscenity. Moreover, the Court's test is not limited to reviewing a Jury finding under Part (c) of the Miller test that the "the work, taken as a whole, lacked serious literary, artistic, political or scientific value." 413 U.S., at 24. Miller also requires independent review of a Jury's determination under Part (b) of the Miller test that the "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable State Law."

In the Jenkins case, the Court actually

stated that the Court itself would review the matters that comprised the violation and after reviewing same that they would have the power to state whether or not the subject matter was obscene despite any decision or ruling by a Jury to the contrary. The Court pointed out the test for obscenity under Miller's supra was not vel non and that despite the factual questions decided by the Jury that the test of Miller in terms of "hard core" still had to be met and that an independent review was required to be made by the Appellate Court and that absent their review and a majority finding the work could not be held to be obscene. Page 161. The Court actually held that the film in question could not be obscene, as a matter of constitutional law, despite the fact that it was found to be obscene under a constitutional obscenity statute by a Jury.

The very same thought was stated in the case of Village Books, Inc. v. State of Maryland, 22 Md. App. 274; 323 Atlantic

Second 698 at page 704, wherein, the Miller test as stated in Jenkins was interpretted as "after the Court's decision today, there could be no doubt that Miller requires Appellate Court - including this Court - to review independently the constitutional fact of obscenity. et al"

Your Petitioner in the case at hand would, therefore, request that the sufficiency of the evidence in her case be reviewed by this Honorable Court to make a determination as to whether or not the acts in question were obscene in terms of Aberdeen Local Ordinance No. 248 despite the finding that they were by the Jury in the case at hand or the alternative to pass an Order ordering that the Court of Appeals of Maryland grant the review of your Petitioner's conviction in the Circuit Court for Harford County for the reasons stated above.

II. THE ACTION OF THE TRIAL COURT IN NOT ALLOWING THE APPELLANT TO PRESENT THE WITNESS KENNETH IMAN IN HER DEFENSE DENIED

HER THE RIGHT TO PRESENT WITNESSES IN HER BEHALF.

The Petitioner attempted to have an individual by the name of Kenneth Iman testify in her behalf both in terms of giving testimony as an expert witness concerning the value of her performance as it relates to science and also as a lay witness to give his opinion as to the standard of her dance in terms of the "community" standard in relationship to local ordinance no. 248.

The trial judge would not allow the testimony of Kenneth Iman as an expert witness because he was not a psychiatrist. There was no comment made by the trial judge as to any other reason given for not allowing the testimony of said witness. Petitioner would state that the trial transcript would indicate that more than an adequate basis was laid concerning the expertise and qualifications of this witness as a mental health counselor of many years of practical and studied experience.

Notwithstanding the trial judges not allowing the expert testimony in terms of the scientific value of the dance, case law allows the absolute use of lay witnesses to give their testimony concerning their opinion of "community standard" in obscenity cases. Smith v. California, 361, U.S. 147, 80 Supreme Court, 215, 4 Law Edition Second 205 (1959); Woodruff v. State, 11 Md. App. 202, 273 Atlantic Second 436 (1971), Yudkin v. State, 229 Md. 223, 182 Atlantic Second 798 (1972).

In Kaplan v. California, 413 U.S. 115 at 121, it is stated "that defense should be free to introduce appropriate expert testimony, et al."

The Petitioner in this case was denied her constitutional right to present witnesses in her on behalf.

III. ABERDEEN ORDINANCE 248 VIOLATES THE FIRST AMENDMENT CONSTITUTIONAL RIGHT TO FREEDOM OF SPEECH (EXPRESSION).

Aberdeen Ordinance No. 248 is unconsti-

tutional in that it is overly broad and covers areas that were never meant to be covered in terms of obscenity by way of the case law upon which said statute is based.

Beginning with the premise that all statutory law on obscenity and/or case law on obscenity at the present time is based upon the case of Miller v. California, supra, the Petitioner would base her argument upon said basis.

All cases following Miller, of both Federal and State constantly and continuously refer to Miller as their "guidelight" in terms of setting the standards for the allowances of regulations for obscenity. Paris Adult Theatre v. Slaton, et al, 413 U.S. 49 (1973); Splawn v. California, 413 U.S. 595 (1977); United States v. Orito, 413 U.S. 139; Kaplan v. California, 413 U.S. 115; United States v. 12 200' reels of Super 8mm. film, et al, 413 U.S. 123; Thomas Ayer v. State of Maryland, supra; A. Kelly Mangum, et al v. Maryland State Board of

Censors, 273 Md. 176 (1974); Jenkins v. Georgia, 418 U.S. 153; Village Books v. State of Maryland, 22 Md. App. 274; John Ebert v. Maryland State Board of Censors, 19 Md. App. 300 (1973).

In the Aberdeen Ordinance No. 248, the drafters of said Ordinance almost verbatim followed the guildelines as given out at Page 24 of the Miller case with respects to the first paragraph of said ordinance and in many regards to the last paragraph in dealing with the specific acts that they would outlaw as being obscene.

Your Petitioner would draw this Honorable Court's attention to the fact that the drafters of the Aberdeen Ordinance saw fit to add the "fondling of the buttocks, anus, breast, or the genitalial of oneself or another" to said list. Your Petitioner would state that the fondling of the buttocks, anus and breast would be a broadening of the example as given in the Miller case at page 25 and as such would be unconstitutional as being

too broad on its face.

Although the examples given at page 25 of the Miller case are as they state "examples", they, on the other hand, would not be given if they were not to be a standard that was to be strickly followed by the drafters of any obscenity Ordinances or Statutes.

As this was further implified in the Jenkins supra case, wherein, at page 160 it talks of the attempts by Miller to set certain limitations. Indeed in Miller and in Jenkins also, the "hard core" test is talked about in stating that Juries do not have unbridled discretion in determining what is obscene. The current Ordinance 248 in and of itself is overly broad in that the fondling of the breast, buttocks, and/or anus, whether actual or simulated as called for in the statute on their face cannot be considered to be obscene and as such would violate the standards as mentioned in Miller and re-emphasized in the Jenkins case.

IV. THE STATE BY NOT PRODUCING EXPERT

TESTIMONY IN THEIR CASE DID NOT MEET THE BURDEN OF PROOF NECESSARY TO CONVICT SOMEONE OF VIOLATING AN OBSCENITY STATUTE INVOLVING FREEDOM OF EXPRESSION, I.E. DANCING.

In the Miller case supra the materials in question were placed in evidence although the State did use an expert to testify concerning community standard. Immediately following in the case of Paris Adult Theatre v. Slaton, et al, 413 U.S. 49 (1973), an expert was not needed and as such was not used by the Government in their case in chief. In page 56 the Court stated that this was not necessary when material itself was placed in evidence.

A continued reading of the Supreme Court cases that followed Miller and the Parks case, i.e. Splawn v. California, United States v. Orito; Kaplan v. California; U.S. v. 12 200' reels, supra, etc. All involved situations where either books, literature, and/or films were themselves placed into evidence. In all of those, the Courts stated that expert

witnesses were not needed for the Government to prove their cases when in fact the materials themselves were placed into evidence.

The Petitioner would argue that the inverse of the above would be true in that in a situation concerning the case at hand wherein the materials themselves cannot be placed into evidence the converse would be true in that expert testimony would be needed for the State to prove its case.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that this Court issue a Writ of Certiorari to review the decisions of the United States Court of Appeals for the Fourth Circuit and the United States District Court for the District of Maryland.

STEPHEN L. MILES
Miles & Cocoros
Suite 1710
36 South Charles Street
Baltimore, Maryland 21201
Telephone: (301) 685-8444
Attorney for Petitoner

APPENDIX

Opinion of the United States Court
of Appeals for the Fourth Circuit
No. 81-6149 - Argued 6/2/81
Decided 6/11/81

PER CURIAM:

The district court denied Susan June Avery a writ of habeas corpus to release her from the sentence imposed upon her conviction of violating a town ordinance proscribing obscenity. She appeals, arguing that Maryland unconstitutionally denied her appellate review of her conviction and that her sixth amendment right to present witnesses in her own behalf was impermissibly abridged when she was denied the right to present the testimony of a "mental health counselor" that her allegedly obscene dancing had scientific value and that it did not offend prevailing community standards.

We see no merit in either argument for the reasons expressed by the district court

in its memorandum and order. We affirm on it (Avery v. State of Maryland, Civ. No. JH-79-1342, D. Md. November 12, 1980).

AFFIRMED.

NO. _____

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM, 1981

SUSAN JUNE AVERY

Petitioner

v.

STATE OF MARYLAND
and
LIEUTENANT E. L. RECTOR
HARFORD COUNTY DETENTION CENTER

Appellees

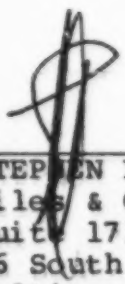
On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

I, Stephen L. Miles, Attorney for Susan June Avery, Petitioner, in the above entitled proceeding, do hereby certify that I served three copies of the Petition for Writ of

Certiorari herein on counsel of record for both Appellees, the Attorney General of the State of Maryland, Stephen H. Sachs, One South Calvert Street, Baltimore, Maryland, 21202, by placing said copies in an envelope addressed to said attorney general at the above captioned address with first class postage affixed, and by depositing the envelope in an United States Post Office in Baltimore, Maryland.



STEPHEN L. MILES
Miles & Cocoros
Suite 1710
36 South Charles Street
Baltimore, Maryland 21201
Telephone: (301) 685-8444
Attorney for Petitioner

Appendix

No. 81-215

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STATE OF MARYLAND
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HARFORD COUNTY DETENTION CENTER,

Appellees.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

STEPHEN L. MILES
Suite 1710
36 South Charles Street
Baltimore, Maryland 21201
Telephone: (301) 685-8444
Attorney for Petitioner

The Daily Record Co., Baltimore, MD 21202

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No. 81-215

IN THE

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Appellees.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

United States Court of Appeals
for the Fourth Circuit

No. 81-6139

Susan June Avery,

Appellant,

v.

State of Maryland, Service on Attorney General, Stephen H. Sachs, Attorney General; and Lieutenant E. L. Rector, Harford County Detention Center,

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph C. Howard, District Judge.

Argued June 2, 1981 *Decided June 11, 1981*

Before WINTER, Chief Judge, SPROUSE, Circuit Judge, and BRITT, District Judge.*

Stephen L. Miles (Cynthia E. Young on brief) for Appellant; Philip M. Andrews (Stephen H. Sachs, Attorney General of Maryland, David H. Feldman, Assistant Attorney General on brief) for Appellees.

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* Honorable W. Earl Britt, United States District Judge for the Eastern District of North Carolina, sitting by designation.

PER CURIAM:

The district court denied Susan June Avery a writ of habeas corpus to release her from the sentence imposed upon her conviction of violating a town ordinance proscribing obscenity. She appeals, arguing that Maryland unconstitutionally denied her appellate review of her conviction and that her sixth amendment right to present witnesses in her own behalf was impermissibly abridged when she was denied the right to present the testimony of a "mental health counselor" that her allegedly obscene dancing had scientific value and that it did not offend prevailing community standards.

We see no merit in either argument for the reasons expressed by the district court in its memorandum and order. We affirm on it (Avery v. State of Maryland, Civ. No. JH-79-1342, D. Md. November 12, 1980).

AFFIRMED.

In The United States District Court
for the District of Maryland

Civil No. JH-79-1342

Susan June Avery,

Petitioner,

v.

State of Maryland and Lieutenant E. L. Rector,
Harford County Detention Center,
Respondents.

MEMORANDUM AND ORDER

This habeas corpus petition for review of a conviction and sentence imposed by the Circuit Court of Harford County was brought under 28 U.S.C. § 2254.

I. BACKGROUND

The petitioner Susan Avery was originally tried and convicted in the Maryland District Court in Harford County for violation of an Aberdeen, Maryland obscenity statute. After receiving a sentence of ten days incarceration and a $100.00 fine, petitioner appealed to the Circuit Court for Harford County in accord with Md. Cts. & Jud. Proc. Code Ann. § 12-401 (cum. supp. 1979). After a *de novo* jury trial in the Circuit Court for Harford County, the Honorable Broadnax Cameron, Jr., presiding, the petitioner was again found guilty and again sentenced to ten days incarceration and a $100.00 fine.[1] The petitioner then filed a petition for a writ of *certiorari* in the Court of

[1] Execution of the sentence was stayed by the state circuit court pending appeal and habeas corpus review.

Appeals of Maryland in which she raised the same contentions she is currently raising:

1. The Maryland Court of Appeals' review of her conviction was mandatory;

2. The charging document was defective;

3. Aberdeen Ordinance No. 248 (under which Avery was convicted) is unconstitutional;

4. The state failed to produce required expert testimony;

5. Petitioner was unconstitutionally denied her right to produce witnesses on her behalf; and

6. Petitioner was improperly sentenced.

Certiorari to the Maryland Court of Appeals was denied.

The respondents asserted Ms. Avery failed to exhaust state remidies available to her under Maryland's Post Conviction Procedure Act. Md. Ann. Code art. 27, § 645 A (cum. supp. 1978).

On February 13, 1980, this Court entered an order directing the respondents to show cause why the writ should not issue; that order was based on the determination that appeal under the Maryland Post Conviction Procedure Act was not required because a fully developed factual record was before the state court of appeals when *certiorari* was denied. *See Thompson v. Peyton*, 406 F.2d 473 (4th Cir. 1968). Thus, her presentation of issues to the Maryland Court of Appeals was deemed, by this Court, a full exhaustion of Ms. Avery's state remedies. *Id.*

The doctrine of comity does not preclude review by this Court.

II. DISCUSSION

A. *The Propriety of the Denial of Certiorari by the Maryland Court of Appeals*

The petitioner and, apparently, the state[2] contend that appellate review of an obscenity conviction is mandatory. Accordingly, Ms. Avery contends this Court should direct the Maryland Court of Appeals to grant *certiorari*.

This brief in mandatory review is seemingly based on a dictum in Justice Brennan's concurring opinion in *Jenkins v. Georgia*, 418 U.S. 153, 163-164 (1974):

> After the Court's decision today, there can be no doubt that *Miller* requires appellate courts — including this Court — to review independently the constitutional fact of obscenity. Moreover, the Court's task is not limited to reviewing a jury finding under part (c) of the *Miller* test that "the work, taken as a whole, lack[ed] serious literary, artistic, political, or scientific value." 413 U.S., at 24. *Miller* also requires independent review of a jury's determination under part (b) of the *Miller* test that "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law."

Justice Brennan's dictum should be read in the context of the majority opinion which merely held that a factual and legal appraisal was required when an obscenity conviction was under appellate review, *Jenkins, supra* at 159-160:

> *Miller* states that the questions of what appeals to the "prurient interest" and what is "patently offensive" under the obscenity test which it formulates are "essentially questions of fact." 413 U.S., at 30.
>
> * * * * * *
>
> But all of this does not lead us to agree with the Supreme Court of Georgia's apparent conclusion that the jury's verdict appellant virtually precluded all further appellate review of appellant's assertion that

[2] The state contends the required appellate review was the *de novo* circuit court trial after the district court conviction.

> his exhibition of the film was protected by the First and Fourteenth Amendments. Even though questions of appeal to the "prurient interest" or of patent offensiveness are "essentially questions of fact," it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is "patently offensive." [The Court said in *Miller*] that "the First Amendment values applicable to the States through the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary[.]"

The imposition of mandatory review would increase the "institutional stress on the judiciary" that concerned Justice Brennan. *Jenkins, supra* at 165. It is this Court's opinion that neither *Miller* nor *Jenkins* alters the discretion of the Maryland Court of Appeals to grant *certiorari*.

It should be noted that Ms. Avery has been afforded considerable judicial safeguards in this matter. She was initially convicted at the state district court level, was given a *de novo* jury trial at the circuit court level, and has had her conviction reviewed by this Court.

The decision of the Maryland Court of Appeals denying *certiorari* is not a basis upon which habeas corpus relief should be granted.

B. *Sufficiency of the Charging Document*

Ms. Avery's contention that the charging document did not adequately inform her of the offense charged is without merit. Her contention is supported by her misapplication of *Ayre v. State*, 21 Md. App. 61 (1974). In *Ayre*, the applicant had been charged with a violation of a Maryland statute prohibiting, *inter alia*, the sale and distribution of obscene matter. The charging document merely paraphrased the code section. Consequently, one count charged numerous offenses specified in the disjunctive (*e.g.* Ayre was charged with distributing or offering to distribute, or possessing with intent to distribute, obscene material). The defendant was unable to ascertain which offenses were actually charged.

The petitioner was charged with unlawfully performing an obscene dance. She contends that the charging document's failure to specify which of 14 prohibited real or simulated acts she allegedly performed was fatally defective. The accused, of course, has a right to notice of the specific charge against her. *Cole v. Arkansas*, 333 U.S. 196, 201 (1948). This specificity is necessary to (a) permit an adequate defense preparation and (b) to permit the defendant to plead judgment as a bar to subsequent prosecution on the same offense. *Hamling v. United States*, 418 U.S. 87 (1974).

Specification in the charging document of the individual acts the petitioner allegedly simulated would not have enabled her to prepare for trial with any higher degree of proficiency. Her factual witness described the dance Ms. Avery performed; it remained for the jury to determine whether it was obscene. It is not apparent in what manner her defense would have been altered had specific lewd acts been charged in the charging document.

Further, as the offense charge was obscene dancing, the charging document provided broad protection against double jeopardy. The petitioner may not be charged in the future with some specific violation of the ordinance (*e.g.* simulated fellatio) based on the incident at issue here.

Thus, the charging document provides no basis for habeas corpus relief.

C. *The Constitutionality of Ms. Avery's Conviction Under the Ordinance.*

The petitioner attacks the constitutionality of the Harford County Ordinance as overly broad because the drafters added obscene acts and simulations not enumerated in *Miller v. California*, 413 U.S. 15 (1973). The specific acts added were fondling of the buttocks, anus, breast, or the genitalia of oneself or another. This contention ignores the Supreme Court's declaration that the *Miller* list "did not purport to be an exhaustive catalog

of what juries might find patently offensive." *Jenkins, supra*, at 160. Rather, the *Miller* list was formulated "to give a few plain examples of what a state statute could define for regulation under . . . the standard announced." *Ibid.*

Ms. Avery apparently concedes the constitutionality of those portions of the ordinance which echo the *Miller* list.[3] It is important to note that the state's witnesses described such acts enumerated in *Miller* as simulated fellatio:

> Q. Did she [the defendant] have any covering, any clothing, at all on her breast? A. No.
>
> Q. Anything on her pubic area? A. No.
>
> Q. All right. Now, then would you tell us what you saw the Defendant do?
>
> * * * * * *
>
> A. And there was a young man there . . . a very young man from his haircut and facial features . . . looked very young.
>
> Q. Okay. And what happened with respect to this young man? A. He was sitting there sort of slouched forward in a chair (witness indicating position) and had a bottle of Miller's . . . a pony bottle . . . that was sitting between his legs . . . his crotch.
>
> * * * * * *
>
> Q. Okay. And then what happened? A. Then she came right up to in front of him. She wasn't no more than eighteen or twenty inches away from him and kneeled down in front of him.
>
> Q. And when she kneeled down in front of him, what did either one of them do? A. She never physically touched him. She put her mouth down on the bottle and made up and down motions with her

[3] The county ordinance contained the customary separability clause; then, even if this Court were to hold unconstitutional those portions of the ordinance to which Ms. Avery takes exception, the portions which embody the *Miller* list would still be effective. Consequently, her conviction would stand.

head on the bottle. But she never did come in contact with him.

Q. Her mouth was on the bottle? A. That's correct.

Transcript, May 15, 1979 ("Tr. 1") at 69, 75-76. There was also testimony that the petitioner simulated masturbation:

Q. Okay. And then what happened after that? A. She would dance in a circular fashion . . . and during the second record that played, she placed her — one of her hands down on the area of her vagina.

* * * * * *

Q. Repeat the testimony again. What did she do? A. She first placed her open palm down near the area of the vagina and then down onto the — her vagina.

Q. Now, did she do anything when her hand was on her vagina? A. She would rub her vagina with her own hand in an up and down fashion to the beat of the music.

Q. All right. And then when she did that, what followed? A. Occasionally when her hand would travel all the way down, her fingers would go out of sight between her legs.

Tr. 1 at 103-104. The state also produced testimony that the petitioner engaged in an act of simulated cunnilingus:

Q. Okay. Now, would you go over on the diagram and mark a C2 at the location? (Witness responding) A. This chair right here, I believe, the second one up from the steps. At this time she had danced over into this area here and there were people sitting in almost all the chairs around the table, and there was a fella sitting at this chair, right in this area here, sittingdown right up against the stage, just like a ledge. It goes around and you can place your beverage on it. And she danced over to this portion of the stage and then sat down on the edge of the stage with her legs dangling down over the edge of the stage. The young man that was sitting there, she

placed her feet — I couldn't actually see where her feet went. They were either on top of each knee or on the seat pad of the side of either side of the knee.

And she reached forward and grabbed the customer's head, on each side of his head around the area of his ears, and pulled his head down into the area of her crotch.

* * * * * *

Tr. 1 at 104-105. Testimony was also given that the petitioner engaged in an act of simulated intercourse:

Q. Now, you testified that she grabbed this young man's head and moved it to the area of her crotch. And what, if anything, happened after she did that? A. She held it there for, I would say, approximately five seconds, after which she raised her head back up and then she she stepped down on the floor itself, got up off the stage — sitting on the stage, stepped down onto the floor itself and was then placing her feet on either side of the chair, straddling the same customer . . . same gentleman. I could see that he had a very large bottle, looked like a Miller beer bottle, on the chair between his legs.

Q. Now, could you . . . demonstrate to the Court and the Jury just what the young man did? A. The bottle was held in this fashion here, holding it — instead of acting it up on the stage, Ms. Avery stood with her foot on each side of the chair facing him and then sat down in this area of his lap, and at this point I couldn't see whether the bottle was between the customer and her or what. Like I say, by this time, I'm off to their side.

Tr. 1 at 105-106.

The petitioner's sole basis for impugning the constitutionality of Ordinance 248 is that its coverage is broader than the "few plain examples" of *Miller*. The Supreme Court has specifically rejected this notion. *Jenkins, supra,* at 160. As there was sufficient evidence that Ms. Avery's performance was within the proscriptions of *Miller*, her

assault on the constitutionality of the Aberdeen Ordinance is an ineffectual basis for her habeas corpus petition.

D. *The State's Failure to Produce Required Expert Testimony.*

Ms. Avery's contention that the state was required to put on expert testimony is bottomed on a faulty conclusion reached through her misunderstanding of *Paris Adult Theatre I v. Slaton*, 413 U.S. 56 (1973). In *Paris* and other cases, the Supreme Court has held that expert testimony is unnecessary where the offensive material is introduced as evidence. 413 U.S. at 56. Ms. Avery posits the inverse that expert testimony is required where the material is not in evidence. Her contention has two fatal flaws.

First, the obscene "material" was put into evidence; in other words, there was descriptive testimony about the dance she performed. Absent a contemporaneous video recording of her performance, eyewitness accounts were sufficient evidence of her actions.

Second, her contention ignores the Supreme Court's advice that expert testimony is generally of little assistance in obscenity cases:

> This is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand. Cf. 2 J. Wigmore, Evidence §§ 556, 559 (3d ed. 1940). No such assistance is needed by jurors in obscenity cases; indeed the "expert witness" practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony. "Simply stated, hard core pornography . . . can and does speak for itself." We reserve judgment, however, on the extreme case, not presented here, where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest.

Paris, supra, n. 6 at 56 (internal citations omitted).

The presentation of expert testimony by the prosecution is neither mandated nor likely to be helpful to the jury in the routine obscenity case. Thus, the state's failure to provide such testimony is not a basis for habeas corpus relief.

E. *The Circuit Court's Refusal to Permit the Testimony of Kenneth Iman.*

Ms. Avery's next contention is that she was unconstitutionally deprived of her right to call witnesses on her behalf. This contention rests solely on the circuit court's treatment of defense witness Kenneth Iman. The petitioner maintains that Iman sought to testify both as a lay and expert witness. The trial court refused to permit Iman to testify. The witness holds an associate degree in mental health (a two-year course of study) and the following proffer was made by the petitioner's counsel:

> (Mr. Miles:) The proffer is two-fold: number one, I offer him as an expert in the field of mental — as a practical mental hygienist; as an expert with regards to that for the purpose of showing that the State's case, even taking everything as being true, in terms of his field of expertise, has scientific value; number two, I feel I have more than qualified him as an expert to do that, in terms of giving an expert opinion of scientific value of the performances as indicated by the State's case only; number three, of course, the cases deal with this, and I'll point out, secondarily, do not require the person be expert at all. They can give an opinion based on being offensive.

Tr. 1 at 204-205.

Later, counsel for the petitioner restated the purposes for which Iman's testimony was offered:

> (Mr. Miles) Before I renew my motion, your Honor, I want to again present that I tried to present the testimony of Mr. Iman. The Court ruled I couldn't.

> Now, obviously, the reason I didn't question him further was because of the Court's ruling. It was my desire to have him testify on the scientific value of the performance and standards of the community would be violated or lacking with regards to the statute.

Transcript of May 16, 1979 ("Tr. 2") at 3.

Maryland evidentiary law quite clearly permits the exclusion of expert testimony on subjects that are comprehensible by a jury of average intelligence. *Patterson v. City of Baltimore*, 130 Md. 645, 101 A. 589 (1917). As the Supreme Court, in *Paris, supra*, has held that expert testimony is not necessary in an obscenity case, the circuit court's exclusion of Iman's expert testimony was proper.

The petitioner contends here that Iman was also prepared to give lay testimony about the appropriate community standard. The prosecuting attorney noted an obvious defect in Iman's proposed testimony: "He has no experience, from what I hear from any of the people in Harford County, attending a particular place of business." Tr. 1 at 206.

Such lay opinion testimony about the appropriate community standard was properly excluded. *See Williams v. New York, P. & N. R. Co.*, 153 Md. 102, 137 A. 506 (1927) (testimony of abstract character, of which jury is probably equally as well informed as witness, may be excluded).

It should be noted that the circuit court permitted Ms. Avery to put on a factual witness whose testimony contradicted the state's witnesses. Thus, the jury was presented with opposing testimony upon which the ultimate determination of obscenity *vel non* could be reached.

F. *The Propriety of Ms. Avery's Sentence.*

Finally, Ms. Avery contends that she was improperly sentenced by the state circuit court because that court merely affirmed the sentence imposed by the state district court. The rationale of her argument is that a *de novo*

circuit court disposition must differ from that imposed at the district court level. To state her position is to demonstrate its flaws. It is clear that she was indeed resentenced and the sentencing judge stated an acceptable reason for his sentence:

> (The Court) Do you have anything to say before I impose sentence?
>
> (Ms. Avery) No. I don't.
>
> (The Court) All right. Well, I'm going to impose the same sentence that has been imposed at the District Court, which I believe is ten days incarceration in the Harford County Detention Center, plus a hundred dollars fine, plus costs.
>
> * * * * * *
>
> (The Court) Now, I'm imposing this sentence — I fully recognize that the crime for which you've been convicted is not a particularly serious one, and I have no information to the effect that you're a vicious or bad person but — and some people might contend that this was what's known as a victimless crime, if there is such a thing as victimless crime, but I feel that the people of Aberdeen have the right, within constitutional limits, to have some control over the tone of the community in which they live, and this includes, again within constitutional limits, the right to regulate the type of entertainment that takes place there. And in a small town like Aberdeen, you can't set aside a particular area for a particular type of entertainment, like the Baltimore block or New York City and so forth. So I feel that the town is within their rights in setting this sort of a penalty, whether one agrees with it or not, and that those rights should be taken seriously.
>
> So consequently, I'm imposing a jail sentence of ten days.

Tr. 2 at 61-62.

The general rule governing this Court's review of a sentence imposed by a state court is clear: "the federal

courts have no right to review any sentence of a state court which does not exceed the statutory maximum sentence which may be imposed under the laws of the state." *Stevens v. Warden, Maryland Penitentiary*, 382 F.2d 429, 433 (4th Cir. 1967), *cert. denied*, 390 U.S. 1031 (1968) (even a shocking sentence is constitutionally unassailable if sentence does not exceed statutory maximum).

As the record reveals an ascertainable, and lawful, exercise of the circuit court's discretion, it is not a basis for habeas corpus relief. *See United States v. Wilson*, 450 F.2d 495, 498 (4th Cir. 1974).

III. CONCLUSION

As the petitioner raises no constitutionally meritorious grounds for habeas corpus relief, the petition will be denied.

Accordingly, it is the 12th day of November, 1980, by the United States District Court for the District of Maryland,

ORDERED:

1. That the Petition of Susan June Avery for Habeas Corpus relief shall be, and the same is hereby, DENIED;

2. That the Clerk of the Court shall prepare an Order entering judgment for the Respondents; and

3. That the Clerk of the Court shall mail copies of this Memorandum and Order to all parties.

JOSEPH C. HOWARD,
United States District Judge.

United States District Court
FOR THE
DISTRICT OF MARYLAND

Civil Action File No. JH-79-1342

Susan June Avery,

Petitioner

v.

State of Maryland, and LT. E. L. Rector,
Harford County Detention Center,

Respondents

JUDGMENT

This action came on for (hearing) before the Court, Honorable Joseph C. Howard , United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the Petition for Writ of Habeas Corpus, in accordance with the Memorandum and Order of the Court dated November 12th, 1980, be and the same hereby IS DENIED.

Dated at Baltimore, Maryland, this 17th day of November, 1980.

PAUL R. SCHLITZ,
Clerk of Court

BY: LOUIS B. CURRAN,
Deputy Clerk of Court.

Opposition

Office - Supreme Court, U.S.
FILED
NOV 6 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-215

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

SUSAN JUNE AVERY,

Petitioner

v.

STATE OF MARYLAND
and
LIEUTENANT E. L. RECTOR
HARFORD COUNTY DETENTION CENTER,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEPHEN H. SACHS,
Attorney General of Maryland

DEBORAH K. HANDEL,
Chief, Criminal Appeals Division

PHILIP M. ANDREWS,
Assistant Attorney General
One South Calvert Building
Baltimore, Maryland 21202
Telephone: (301) 659-4000

Attorneys for Respondents

QUESTIONS PRESENTED

1. Whether the Petitioner, who was convicted of engaging in an obscene performance, on her de novo appeal again convicted, and then denied discretionary review by the Court of Appeals of Maryland, was denied any required appellate consideration of her case in light of the undisputable rule that there is no federal constitutional right to State appellate review of a criminal conviction.

2. Whether Petitioner was denied her right to have compulsory process for obtaining witnesses in her favor or her right to due process when the State court, in her de novo trial by jury, exercised its discretion and refused to qualify as an expert on the "scientific value" of her obscene performance, a young man who, while he had varied counseling experience, was still in college and possessed no formal degree other than that of a two year mental health associate.

3. Whether Local Ordinance No. 248 of the town of Aberdeen, Maryland, was unconstitutionally overbroad in defining unlawful sexual conduct.

4. Whether the State to sustain its burden of proof was required to present expert testimony to the jury regarding the applicable community standard by which Petitioner's obscene performance was to be judged.

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NO. 81-215

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v.

STATE OF MARYLAND
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LIEUTENANT E. L. RECTOR
HARFORD COUNTY DETENTION CENTER,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY COMMENT

This Brief of Respondents in Opposition to Petition for Writ of Certiorari is filed pursuant to the request of this Court dated October 8, 1981.

OPINIONS BELOW

In her petition for writ of certiorari, Petitioner reproduced in the appendix only the decision of the United States Court of Appeals for the Fourth Circuit, Avery v. State of Maryland, No. 81-6139 (decided June 11, 1981). That decision expressly relied upon the reasoning of the District Court's unpublished Memorandum and Order in Avery v. State of Maryland, Civil No. JH-79-1342 (D.Md. Nov. 17, 1980) (Howard, J.). For that reason, Respondent has reproduced in the appendix hereto a copy of the District Court's Memorandum and Order as well as a copy of the Order of the Court of Appeals of Maryland, dated June 22, 1979, denying Petitioner's Petition for Writ of Certiorari in that court, Avery v. State, Petition No. 114 (September Term, 1979).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

STATE STATUTES

Maryland Annotated Code,

Courts and Judicial Proceedings Article,

§4-301. **Exclusive Original Jurisdiction.**

. . .

(b) Other Violations.—Except as provided in Section 4-302, the District Court also has exclusive original jurisdiction in a criminal case in which a person at least 18 years old or a corporation who is charged with:

. . .

(4) criminal violation of a state, county, or

municipal rule or regulation, if the violation is not a felony; . . .

§12-305. **Certification of Decisions to Court of Appeals for Review and Determination.** — The Court of Appeals shall require by writ of certiorari that a decision be certified to it for review and determination in any case in which a final judgment has been rendered by a circuit court on appeal from the district court if it appears to the Court of Appeals, upon petition of a party that:

(1) Review is necessary to secure uniformity of decision, as where the same statute has been construed differently by two or more judges; or

(2) There are other special circumstances rendering it desirable and in the public interest that the decision be reviewed.

§12-401. **Right of Appeal Generally.**

(a) Civil and Criminal Cases. — A party in a civil case or the defendant in a criminal case may appeal from a final judgment entered in the District Court. ...

(d) De Novo and On Record Appeals. — ...In a civil case in which the amount in controversy exceeds $500, and in any case in which the parties so agree, an appeal shall be heard on the record made in the District Court. In every other case, including a criminal case in which sentence as been imposed or suspended following a plea of nolo contendere or guilty, and an appeal in a municipal infraction case, an appeal shall be tried de novo.

STATEMENT OF THE CASE

The instant petition seeks review of the decision of the United States Court of Appeals for the Fourth Circuit which affirmed the denial of habeas corpus relief by the United

States District Court for the District of Maryland (Howard, J.) pursuant to that court's Memorandum and Order dated November 12, 1980. The habeas corpus petition, accompanied by a memorandum of law, was filed by retained counsel for Petitioner, Susan June Avery, on July 17, 1979. After a transcript of the proceedings in Petitioner's circuit court trial was prepared, the State of Maryland on March 26, 1980 filed a supplemental answer responding substantively to each of the six contentions presented by the petition. The District Court heard oral argument on October 23, 1980, and after holding the matter sub curia, denied issuance of the writ in a Memorandum and Order dated November 12, 1980 (Apx. 1). A judgment order followed on November 17, 1980 and Petitioner filed her notice of appeal one week later. On November 22, 1980, the District Court granted a certificate of probable cause for an appeal, pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure.

While a more extensive and graphic exposition of the proof of the criminal charges against Petitioner appears in the District Court's Memorandum and Order of November 12, 1980, the following facts can be briefly summarized for purposes of this Court's review of the instant petition. On February 28, 1978, two deputies of the Harford County Sheriff's Department arrived at different times during the evening at the Playgirl Club in the Town of Aberdeen, which is located in Harford County. Each deputy was admitted upon paying the $5 admission charge. During the course of their stay, one or both of the deputies observed Petitioner, Susan

June Avery, co-owner of the club and one of its dancers, doing a number of things while performing her routines. These included, while completely nude, simulated fellatio and intercourse with beer bottles held between male patron's legs, simulated masturbation, and simulated cunnilingus by grabbing a customer's head and pulling it down in the area of her crotch. (Apx. 6-8).

The deputys' observations resulted in the filing of a statement of charges in the District Court of Maryland for Harford County. A criminal summons was issued. Specifically, Petitioner was charged with unlawfully performing and participating in a live obscene performance and dance exhibition in the presence of others who paid consideration to see it, in contravention of Town of Aberdeen Ordinance No. 248.

After a bench trial in the District Court in accordance with Md. Cts. & Jud. Proc. Code Ann. §4-301(a)(3), Petitioner was found guilty and sentenced to serve ten days in the Harford County Detention Center and to pay a $100 fine and court costs. Execution of the sentence was stayed when Petitioner exercised her right to a de novo appeal to the Circuit Court for Harford County, Md. Cts. & Jud. Proc. Code Ann. §12-401, where she elected and received a trial by jury.

At the de novo jury trial, Petitioner, her co-owner of the Playgirl Club, and a number of patrons testified for the defense. She also called as a witness to give opinion

testimony one Kenneth E. Iman of Baltimore, Maryland. During the voir dire by Petitioner's counsel, it developed that Mr. Iman was a mental health counselor at an out-patient facility known as the Southeastern Community Mental Health Center and had previously been employed at Shepherd-Pratt Hospital in Towson, Maryland, where according to his testimony, he was "in charge of the "Geriatric Program." As part of his two year mental health associates program at Essex Community College, Mr. Iman had worked without pay "with accutely psychotic patients" at Spring Grove Hospital, a state mental health facility. He also had what he described as "a year's training at the Baltimore Center for Counseling Service" which he described as a "telephone intervention" or "crisis intervention hotline" and "out-patient facility" dealing with "overdoses, things of that nature or type". His background also included a one-day seminar on "rational emotional therapy" and a two-day workshop on geriatrics, as well as two and half hours per week (for an unstated number of weeks) supervision by a psychiatrist monitoring his work. At the time of his testimony, Mr. Iman was "still in school" at Towson State University "taking psychology courses". He claimed to have been Phi Beta Kappa at Essex Community College and at Towson State had completed "about 16" credits which, if he were matriculated in a Baccalaureate Program and had been given full credit for his community college work, would have placed him at the beginning of the second semester of his junior year of undergraduate work.

Mr. Iman apparently had not personally observed any of the occurrences at the Playgirl Club in the town of Aberdeen on February 28, 1978, that resulted in Petitioner's being charged, but he had been present in the courtroom during the State's case. He was offered "as an expert in the field of mental—as a practical mental hygienist" to give "an expert opinion of scientific value of the performances" of Petitioner, as well as "an opinion based on [Petitioner's performances] being offensive". In relevant part, the specific proffer as to Mr. Iman's testimony by defense counsel was as follows:

> "Mr. Miles: Well, the proffer would be, Your Honor, that he is going to give an opinion in full detail that this type of observation is made by the individual in the audience; let's them act out sexual aggressions in their mind and this is an outlet they have that's of scientific value...He's going to talk to that as being a proper outlet for sexual fantasies and sexual aggression and, therefore, it has a definite value."

The State objected based upon the nature of Mr. Iman's experience, his lack of any contact with the people of Harford County, and his not being a psychiatrist or doctor. Defense counsel continued Mr. Iman's voir dire regarding the witness' ability to "give any type of opinion concerning sexual aggression and/or fantasies." In this phase of the voir dire, Mr. Iman testified that he had "fifty or sixty hours of theory...abnormal psychology theory," later clarified to mean "fifty or sixty hours, roughly, in other words, a course"; one course each of "perhaps 45 to 50 hours" in "adolescents [sic]

psychology and child psychology," as well as in "general human sexual response but not in sexual aggression alone," although the last course was later qualified to be one in "personality" of which "perhaps 20 to 25 percent" dealt with its "sexual aspects". Finally, Mr. Iman estimated that of the people he had counseled in the year preceding his testimony, "perhaps" 140 had exhibited sexual behavioral problems "in varying degrees."

At this juncture, defense counsel offered Mr. Iman "as being able to give an opinion as to what he heard in the courtroom as regards the value of the scientific evidence in the case." The State objected, and the trial court sustained the objection, stating its belief that "to give the testimony...a person would have to be at least a licensed psychiatrist." In response to the trial court's ruling, defense counsel stated that he had "no other questions" and that "the Defense would rest."

After Petitioner's renewed motion for judgment of acquittal was denied, instructions and final argument proceeded and the jury unanimously found Petitioner guilty as charged. With the concurrence of defense counsel, sentence was imposed that same day. The sentence was identical to that imposed by the District Court: ten days incarceration and a $100 fine, plus costs. Again, at defense counsel's request, execution of the sentence was stayed.

Next, Petitioner sought a writ of certiorari from the Court of Appeals of Maryland, the issuance of which was

denied on June 22, 1979 (Apx. 15). No further appeal of right was available because, under the law of Maryland, only discretionary review is possible of a "case in which a final judgment has been rendered by a circuit court on appeal from the district court." Maryland Courts and Judicial Proceedings, Code Ann. §12-305.

In her Petition for Writ of Habeas Corpus, filed in the United States District Court for the District of Maryland on July 17, 1979, Petitioner raised the same six grounds for relief that formed the basis for her state court petition for writ of certiorari. The District Court heard argument on October 23, 1980, and filed its Memorandum and Order denying relief on November 12, 1980. On appeal to the Fourth Circuit, Petitioner pressed only two of the six issues raised in the District Court. Oral argument occurred on June 2, 1981 and on June 11, 1981, the Fourth Circuit issued a per curiam opinion affirming the District Court's determination that Petitioner was not denied any appellate review to which she was entitled and that the trial court's exclusion of the proffered testimony of Kenneth E. Iman was proper and not an abuse of discretion.

SUMMARY OF ARGUMENT

I. Petitioner received all that appellate review of her obscenity conviction to which she was entitled under Maryland law and the prior decisions of this Court.

II. The trial court's exclusion of the "scientific opinion" testimony of Petitioner's proffered "expert" was not an abuse of discretion.

III. The town ordinance under which Petitioner was convicted was not constitutionally overbroad in its definition of unlawful sexual conduct.

IV. The prosecution in an obscenity case is not required to present expert testimony to sustain its burden of proof.

REASONS FOR DENYING THE WRIT

I.

THE DENIAL OF DISCRETIONARY REVIEW IN PETITIONER'S CASE WAS OF NO CONSTITUTIONAL SIGNIFICANCE BECAUSE NEITHER SHE NOR ANY OTHER CONVICTED CRIMINAL HAS ANY RIGHT TO STATE APPELLATE REVIEW OF HIS OR HER CONVICTION.

Initially, Petitioner asks this Court "to make a determination as to whether or not the acts in question were obscene in terms of Aberdeen Local Ordinance No. 248"; alternatively, Petitioner seeks this Court to order "the Court of Appeals of Maryland grant review...Petitioner's conviction in the Circuit Court for Harford County." (Pet. 12). The basis of such a request for relief is Petitioner's contention that prior decisions of this Court "require Appellate review of the factual basis for any criminal conviction involving" obscenity. (Pet. 9). Respondent submits that because no appellate review of any kind was constitutionally required, Petitioner's first asserted reason for granting the writ is without merit.

All that the cases relied on by Petitioner stand for is the sensible proposition that the test for obscenity enunciated in Miller v. California, 413 U.S. 15 (1973), has as its safeguard of first amendment values "the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary." Id. at 25 (emphasis added). Similarly, even the language from Jenkins v. Georgia, 418 U.S. 153 (1974), on which Petitioner relies (Pet. at 10-11), which she fails to mention comes not from Justice Rehnquist's opinion of the Court but from Justice Brennan's separate opinion (joined only by Justices Stewart and Marshall, concurring in the result) does not aid her cause. Justice Rehnquist's opinion for the Court in Jenkins does no more than restate verbatim the language of Miller, quoted above, about the "ultimate power" of appellate courts, "when necessary", to conduct an independent review. 418 U.S. at 160. In context, Justice Brennan's language certainly implies only that when a case is properly in an appellate court for decision on the merits, "Miller requires appellate courts—including this Court—to review independently the constitutional fact of obscenity." Jenkins v. Georgia, supra, 418 U.S. at 163 (separate opinion). Indeed, Justice Brennan's inclusion of the phrase, "including this Court," allows no other construction of the entire sentence; to read it otherwise, as urged by Petitioner, would require this Court to grant certiorari automatically in all obscenity cases. Such a burden is clearly not mandated by Jenkins v. Georgia, supra, and neither this Court nor the Court of Appeals of Maryland need

be required to relinquish its discretionary power to consider cases involving obscenity on a case-by-case basis.

Further, this Court has consistently held that it is "well settled that there is no constitutional right to appeal. McKane v. Durston, 153 U.S. 684 (1894)." Abney v. United States, 431 U.S. 651, 656 (1977) (Chief Justice Burger for a unanimous Court). See Estelle v. Durrough, 420 U.S. 534, 536 (1975) ("the Court of Appeals correctly recognized that there is no federal constitutional right to state appellate review of state criminal convictions").

Under these circumstances and particularly because under Maryland law Petitioner was entitled to and received a de novo appeal to the Circuit Court for Harford County, as well as consideration by the Court of Appeals of Maryland whether to exercise its further discretionary review, Petitioner's claim that she was denied proper appellate review is wholly without merit. As noted by the District Court, Petitioner "has been afforded considerable judicial safeguards in this matter." (Apx. 4). Petitioner suggests no reason why the nature of appellate review provided by the State of Maryland is not constitutionally adequate, and Respondent submits that there is no basis for granting habeas relief on this ground.

II.

THE STATE COURT'S REFUSAL TO QUALIFY AS AN EXPERT ON THE "SCIENTIFIC VALUE" OF PETITIONER'S OBSCENE PERFORMANCE, A MINIMALLY TRAINED YOUNG MAN WHO LACKED EVEN A BACCALAUREATE DEGREE, WORKED NO DENIAL OF CONSTITUTIONAL RIGHTS.

The second ground asserted in the instant petition is that the "action of the trial court in not allowing [Petitioner] to present the witness, Kenneth Iman, in her defense denied her the right to present witnesses in her behalf." (Pet. 12-13). In essence, Petitioner perceives error in the trial court's refusal to allow opinion testimony on the "scientific value" of her obscene performance from her proffered expert witness, a college student/"mental health counselor," Kenneth E. Iman. Because the State court's determination was abundantly correct and well within its discretion, Respondent submits that the conclusion of the District Court, and the Fourth Circuit's adoption of it, that exclusion of Mr. Iman's testimony was proper, is unassailable.

Mr. Iman apparently had not been at the Playgirl Club on the actual night in question, February 28, 1978. Indeed, from his extensive voir dire, one cannot conclude that he had ever been at the Playgirl Club—or the town of Aberdeen or Harford County, Maryland for that matter—much less ever observe Petitioner dance and perform. All that is clear is that Mr. Iman was present in the courtroom for the State's case and after extensive voir dire was offered as "an expert in the field of mental—as a practical mental hygienist" to

give: (1) "an expert opinion of scientific value of the performances"; (2) "an opinion based on [their] being offensive"; and (3) as later restated, "as being able to give an opinion as to what he heard in the courtroom as regards the value of the scientific evidence in the case."

On the day after the defense rested, when defense counsel was arguing his renewed motion for judgment of acquittal, he commented:

> "It was my desire to have [Mr. Iman] testify on the scientific value of the performance and standards of the community would be violated or lacking with regards to the statute.
>
> And I renew my motion for judgment of acquittal and would submit without argument."

Nevertheless, Petitioner now claims that Petitioner sought to have Mr. Iman testify "as a lay witness to give his opinion as to the standard of her dance in terms of the "community" standard in relationship to Local Ordinance No. 248." (Pet. 13). This is simply not supported by the record and is in fact belied by the comments above. Clearly such an assertion is without merit given the absence of any evidence in the record that Mr. Iman had ever visited or knew anything of "community standards" either in the small town of Aberdeen or even in Harford County, Maryland.

With regard to the refusal to qualify Mr. Iman as an expert, it is difficult to fathom Petitioner's argument that somehow this exercise of discretion violated her compulsory right of process to obtain witnesses or the due process to

which she was entitled. Whether or not process was required or issued, Mr. Iman appeared, quite obviously voluntarily, and he was present in court for the State's entire case. He was called and sworn as a witness and defense counsel questioned him extensively about his background, training and experience.

All that Petitioner can complain of is the trial court's exercise of his discretion in declining to qualify Mr. Iman as an expert. However, given his college student status, that most of his experience appeared to have been with the elderly, "with accutely psychotic patients" or with "telephone intervention" dealing with "overdoses, things of that nature or type", one could not rationally equate declining to qualify him as an expert with the denial of the Sixth Amendment right to have compulsory process for obtaining witnesses in one's favor. Indeed, the trial court's exercise of discretion was entirely proper and its conclusion cannot reasonably be disputed when one also considers there was no evidence at all that Mr. Iman had ever worked with the military population that frequented the Playgirl Club and that the extent of this supposed expert's formal training in human sexual response appeared to be "20 to 25 percent" of a single college or community college course on "personality".

Petitioner cites no cases for the proposition that the refusal of a state criminal trial court to qualify an expert witness potentially implicates Sixth or Fourteenth Amendment rights. Even if such cases could be found,

however, they obviously would have no application to the refusal to qualify a minimally trained college student, with questionably relevant experience, to express an expert opinion on the "scientific value" of a nude dance performance simulating cunnilingus, fellatio, intercourse and masturbation. Under these circumstances, Petitioner's second contention is utterly frivolous. See e.g. Washington v. Texas, 388 U.S. 14, 23 (1967) ("the framers of the constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use"); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 n.6 (1973) ("[obscenity] is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand....no such assistance is needed by jurors in obscenity cases; indeed the 'expert witness' practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony."); Hamling v. United States, 418 U.S. 87, 108 (1974) (the trial court has "wide discretion [in obscenity prosecution] in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony."); United States v. Pierson, 503 F.2d 173 (D.C.Cir. 1974) (trial judge has broad discretion in deciding whether or not to permit opinion testimony); United States v. Manarte, 448 F.2d 583 (2nd Cir. 1971), cert. denied, 404 U.S. 947 (1972) (report of Commission on Obscenity and Pornography properly excluded

from evidence as being irrelevant and as usurping function of jury). As noted in Shauer, The Law of Obscenity, §16.1 at 281 (1976):

> "Expert testimony in an obscenity case must be legally relevant. This issue rises most often in the context of proffered testimony as to the presence or absence of harm from exposure to obscene or pornographic materials....[T]estimony that scientific studies or psychological opinion, or anything else shows exposure to sexually explicit materials as not to be harmful is immaterial. It does not tend to prove anything that is in issue in the case and thus should be excluded. It is the function of the trier of fact to determine whether or not the appropriate statute includes the particular conduct at issue, not whether or not the assumptions on which the statute is based are current."

Accordingly, the District Court's decision and the Fourth Circuit affirmance thereof, finding that the State court's failure to qualify Mr. Iman as an expert witness did not form a basis for granting federal habeas corpus relief, was correct.

III.

TOWN OF ABERDEEN ORDINANCE 248 IS NOT UNCONSTITUTIONALLY OVERBROAD IN ITS DEFINITION OF OBSCENE SEXUAL CONDUCT.

The third ground urged to invoke this Court's discretionary review is Petitioner's contention that the town ordinance under which she was convicted "is overly broad and covers areas that were never meant to be covered in terms of obscenity by way of the case law upon which said statute is

based." (Pet. 14-15). Because that issue was neither raised before, nor considered by, the Court of Appeals, Respondent submits that the issue is not a proper one upon which to grant the issuance of a writ of certiorari. Adickes v. Kress and Co., 398 U.S. 144, 147, n.2 (1970); United States v. Lovasco, 431 U.S. 783, 788, n.7 (1977); California v. Taylor, 353 U.S. 553, 557, n.2 (1957).

Alternatively, it is clear that Petitioner's third contention is without merit. Petitioner concedes that in drafting the ordinance, the town of Aberdeen "almost verbatim followed the guidelines as given out at Page 24" of Miller v. California, supra. (Pet. 16). Petitioner further concedes that "the examples given at page 25 of the Miller case are as they state 'examples' ". (Pet. 17). As found by the District Court, the State's witnesses in Petitioner's trial court proceeding described Petitioner's acts on the night in question as simulated fellatio, simulated masturbation, simulated intercourse, and simulated cunnilingus (Apx. 6-8). The District Court correctly reasoned that Petitioner's contention ignores this Court's declaration in Jenkins v. Georgia, supra at 160, that the Miller list of obscene acts and simulations "did not purport to be an exhaustive catalog of what juries might find patently offensive." Jenkins, supra, at 160. As stated in Jenkins, the Miller list was formulated "to give a few plain examples of what a state statute could define for regulation under...the standard announced." Id.

Moreover, as pointed out by the District Court, the town ordinance contained the customary separability clause such that even if the portions of the ordinance to which Petitioner takes exception were determined to be unconstitutional, the portions which embodied the Miller list would still be effective, thus permitting her conviction to stand. (Apx. 6,n.3).

IV.

THE STATE WAS NOT REQUIRED TO PRODUCE EXPERT TESTIMONY TO SUSTAIN ITS BURDEN OF PROVING THAT PETITIONER'S PERFORMANCE WAS OBSCENE UNDER THE PROVISIONS OF TOWN OF ABERDEEN ORDINANCE NO. 248.

As with the third ground asserted in the instant petition, the fourth and final contention of Petitioner, not having been briefed in, considered by, or presented to the Court of Appeals, does not provide a proper basis to invoke this Court's discretionary review of the Fourth Circuit decision, in light of the authorities cited in Argument III, supra.

Alternatively, Respondent submits that the reasoning of the District Court in rejecting this contention as a basis for federal habeas corpus relief was entirely correct. The District Court noted that Petitioner's contention that the State was required to put on expert testimony was bottomed "on a faulty conclusion reached through her misunderstanding of Paris Adult Theatre I v. Slaton, supra." (Apx. 8-9). In Paris, this Court held that expert testimony is unnecessary where the offensive material is introduced as evidence. 413

U.S. at 56. Petitioner claims that expert testimony is required where the material is not in evidence; however, the District Court determined that such a contention "has two fatal flaws": (1) in the instant case, the obscene "material" was in fact placed in evidence before the jury because there was descriptive eyewitness testimony about the dance she performed, and such eyewitness accounts "were sufficient evidence of her actions...absent a contemporaneous recording of her performance." (Apx. 9); (2) Petitioner's contention ignores this Court's acknowledgement that expert testimony is generally of little assistance in obscenity cases, Paris, supra, n. 6 at 56. It is therefore clear that the presentation of expert testimony by the prosecution is neither mandated nor likely to be helpful to the jury in routine obscenity cases such as this one.

CONCLUSION

For the foregoing reasons, Respondent requests this Court deny the Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

STEPHEN H. SACHS,
Attorney General of Maryland

DEBORAH K. HANDEL,
Chief, Criminal Appeals Division

PHILIP M. ANDREWS,
Assistant Attorney General

One South Calvert Building
Baltimore, Maryland 21202
Telephone: (301) 659-4000

Attorneys for Respondents

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SUSAN JUNE AVERY •

Petitioner •

v. •

STATE OF MARYLAND • CIVIL NO. JH-79-1342
and
LIEUTENANT E. L. HECTOR
Harford County Detention •
Center

Respondents •

• • • • •

MEMORANDUM AND ORDER

This habeas corpus petition for review of a conviction and sentence imposed by the Circuit Court of Harford County was brought under 28 U.S.C. § 2254.

I. BACKGROUND

The petitioner Susan Avery was originally tried and convicted in the Maryland District Court in Harford County for violation of an Aberdeen, Maryland obscenity statute. After receiving a sentence of ten days incarceration and a $100.00 fine, petitioner appealed to the Circuit Court for Harford County in accord with Md. Cts. & Jud. Proc. Code Ann. § 12-401 (cum. supp. 1979). After a de novo jury trial in the Circuit Court for Harford County, the Honorable Broadnax Cameron, Jr., presiding, the petitioner was again found guilty and again sentenced to ten days incarceration and a $100.00 fine.[1] The petitioner then filed a petition for a writ of certiorari in the Court of Appeals of Maryland in which she raised the same contentions she is currently raising:

---

[1] Execution of the sentence was stayed by the state circuit court pending appeal and habeas corpus review.

Eq. U. Nov. 1980

1. The Maryland Court of Appeals' review of her conviction was mandatory;

2. The charging document was defective;

3. Aberdeen Ordinance No. 248 (under which Avery was convicted) is unconstitutional;

4. The state failed to produce required expert testimony;

5. Petitioner was unconstitutionally denied her right to produce witnesses on her behalf; and

6. Petitioner was improperly sentenced.

Certiorari to the Maryland Court of Appeals was denied.

The respondents asserted Ms. Avery failed to exhaust state remedies available to her under Maryland's Post Conviction Procedure Act. Md. Ann. Code art. 27, § 645A (cum. supp. 1978).

On February 13, 1980, this Court entered an order directing the respondents to show cause why the writ should not issue; that order was based on the determination that appeal under the Maryland Post Conviction Procedure Act was not required because a fully developed factual record was before the state court of appeals when certiorari was denied. See Thompson v. Peyton, 406 F. 2d 473 (4th Cir. 1968). Thus, her presentation of issues to the Maryland Court of Appeals was deemed, by this Court, a full exhaustion of Ms. Avery's state remedies. Id.

The doctrine of comity does not preclude review by this Court.

II. DISCUSSION

A. The Propriety of the Denial of Certiorari by the Maryland Court of Appeals

The petitioner and, apparently, the state[1] contend that appellate review of an obscenity conviction is mandatory.

---

[1] The state contends the required appellate review was the de novo circuit court trial after the district court conviction.

Accordingly, Ms. Avery contends this Court should direct the Maryland Court of Appeals to grant certiorari.

This belief in mandatory review is seemingly based on a dictum in Justice Brennan's concurring opinion in Jenkins v. Georgia, 418 U.S. 153, 163-164 (1974):

> After the Court's decision today, there can be no doubt that Miller requires appellate courts--including this Court--to review independently the constitutional fact of obscenity. Moreover, the Court's task is not limited to reviewing a jury finding under part (c) of the Miller test that "the work, taken as a whole, lack[ed] serious literary, artistic, political, or scientific value." 413 U.S., at 24. Miller also requires independent review of a jury's determination under part (b) of the Miller test that "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law."

Justice Brennan's dictum should be read in the context of the majority opinion which merely held that a factual and legal appraisal was required when an obscenity conviction was under appellate review. Jenkins, supra at 159-160:

> Miller states that the questions of what appeals to the "prurient interest" and what is "patently offensive" under the obscenity test which it formulates are "essentially questions of fact." 413 U.S., at 30.
>
> * * *
>
> But all of this does not lead us to agree with the Supreme Court of Georgia's apparent conclusion that the jury's verdict appellant virtually precluded all further appellate review of appellant's assertion that his exhibition of the film was protected by the First and Fourteenth Amendments. Even though questions of appeal to the "prurient interest" or of patent offensiveness are "essentially questions of fact," it would be a serious misreading of Miller to conclude that juries have unbridled discretion in determining what is "patently offensive." [The Court said in Miller] that "the First Amendment values applicable to the States through the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary[.]"

The imposition of mandatory review would increase the "institutional stress on the judiciary" that concerned Justice Brennan.

Jenkins, supra at 163. It is this Court's opinion that neither Miller nor Jenkins alters the discretion of the Maryland Court of Appeals to grant certiorari.

It should be noted that Ms. Avery has been afforded considerable judicial safeguards in this matter. She was initially convicted at the state district court level, was given a de novo jury trial at the circuit court level, and has had her conviction reviewed by this Court.

The decision of the Maryland Court of Appeals denying certiorari is not a basis upon which habeas corpus relief should be granted.

B. Sufficiency of the Charging Document

Ms. Avery's contention that the charging document did not adequately inform her of the offense charged is without merit. Her contention is supported by her misapplication of Ayre v. State, 21 Md. App. 61 (1974). In Ayre, the applicant had been charged with a violation of a Maryland statute prohibiting, inter alia, the sale and distribution of obscene matter. The charging document merely paraphrased the code section. Consequently, one count charged numerous offenses specified in the disjunctive (e.g. Ayre was charged with distributing or offering to distribute, or possessing with intent to distribute, obscene material). The defendant was unable to ascertain which offenses were actually charged.

The petitioner was charged with unlawfully performing an obscene dance. She contends that the charging document's failure to specify which of 14 prohibited real or simulated acts she allegedly performed was fatally defective. The accused, of course,has a right to notice of the specific charge against her. Cole v. Arkansas, 333 U.S. 196, 201 (1948). This specificity

is necessary to (a) permit an adequate defense preparation and (b) to permit the defendant to plead judgment as a bar to subsequent prosecution on the same offense. Hamling v. United States, 418 U.S. 87 (1974).

Specification in the charging document of the individual acts the petitioner allegedly simulated would not have enabled her to prepare for trial with any higher degree of proficiency. Her factual witness described the dance Ms. Avery performed; it remained for the jury to determine whether it was obscene. It is not apparent in what manner her defense would have been altered had specific lewd acts been charged in the charging document.

Further, as the offense charge was obscene dancing, the charging document provided broad protection against double jeopardy. The petitioner may not be charged in the future with some specific violation of the ordinance (e.g. simulated fellatio) based on the incident at issue here.

Thus, the charging document provides no basis for habeas corpus relief.

C. The Constitutionality of Ms. Avery's Conviction Under the Ordinance.

The petitioner attacks the constitutionality of the Harford County Ordinance as overly broad because the drafters added obscene acts and simulations not enumerated in Miller v. California, 413 U.S. 15 (1973). The specific acts added were fondling of the buttocks, anus, breast, or the genitalia of oneself or another. This contention ignores the Supreme Court's declaration that the Miller list "did not purport to be an exhaustive catalog of what juries might find patently offensive." Jenkins, supra, at 160. Rather, the Miller list was formulated "to give a few plain examples of what a state statute could define for regulation under...the standard announced." Ibid.

Ms. Avery apparently concedes the constitutionality of those portions of the ordinance which echo the Miller list.1/ It is important to note that the state's witnesses described such acts enumerated in Miller as simulated fellatio:

> Q. Did she [the defendant] have any covering, any clothing, at all on her breast?
>
> A. No.
>
> Q. Anything on her pubic area?
>
> A. No.
>
> Q. All right. Now, then would you tell us what you saw the Defendant do?
>
> * * *
>
> A. And there was a young man there...a very young man from his haircut and facial features...looked very young.
>
> Q. Okay. And what happened with respect to this young man?
>
> A. He was sitting there sort of slouched forward in a chair, (witness indicating position) and had a bottle of Miller's ...a pony bottle...that was sitting between his legs...his crotch.
>
> * * *
>
> Q. Okay. And then what happened?
>
> A. Then she came right up to in front of him. She wasn't no more than eighteen or twenty inches away from him and kneeled down in front of him.
>
> Q. And when she kneeled down in front of him, what did either one of them do?
>
> A. She never physically touched him. She put her mouth down on the bottle and made up and down motions with her head on the bottle. But she never did come in contact with him.
>
> Q. Her mouth was on the bottle?
>
> A. That's correct.

1/ The county ordinance contained the customary separability clause; thus, even if this Court were to hold unconstitutional those portions of the ordinance to which Ms. Avery takes exception, the portions which embody the Miller list would still be effective. Consequently, her conviction would stand.

Transcript, May 15, 1979 ("Tr. 1") at 69, 75-76. There was also testimony that the petitioner simulated masturbation:

> Q. Okay. And then what happened after that?
>
> A. She would dance in a circular fashion... and during the second record that played, she placed her -- one of her hands down on the area of her vagina.
>
> . . .
>
> Q. Repeat the testimony again. What did she do?
>
> A. She first placed her open palm down near the area of the vagina and then down onto the -- her vagina.
>
> Q. Now, did she do anything when her hand was on her vagina?
>
> A. She would rub her vagina with her own hand in and up and down fashion to the beat of the music.
>
> Q. All right. And then when she did that, what followed?
>
> A. Occasionally when her hand would travel all the way down, her fingers would go out of sight between her legs.

Tr. 1 at 103-104. The state also produced testimony that the petitioner engaged in an act of simulated cunnilingus:

> Q. Okay. Now, would you go over on the diagram and mark a CI at the location?
>
> (Witness responding)
>
> A. This chair right here, I believe, the second one up from the steps. At this time she had danced over into this area here and there were people sitting in almost all the chairs around the table, and there was a fella sitting at this chair, right in this area here, sitting down right up against the stage, just like a ledge. It goes around and you can place your beverage on it. And she danced over to this portion of the stage and then sat down on the edge of the stage with her legs dangling down over the edge of the stage. The young man that was sitting there, she placed her feet -- I couldn't actually see where her feet went. They were either on top of each knee or on the seat pad of the side of either side of the knee.
>
> And she reached forward and grabbed the customer's head, on each side of his head around the area of his ears, and pulled his head down into the area of her crotch.
>
> . . .

Tr. 1 at 104-105. Testimony was also given that the petitioner engaged in an act of simulated intercourse:

> Q. Now, you testified that she grabbed this young man's head and moved it to the area of her crotch. And what, if anything, happened after she did that?
>
> A. She held it there for, I would say, approximately five seconds, after which she raised her head back up and then when she stepped down on the floor itself, got up off the stage — sitting on the stage, stepped down onto the floor itself and was then placing her feet on either side of the chair, straddling the same customer...same gentleman. I could see that he had a very large bottle, looked like a Miller beer bottle, on the chair between his legs.
>
> Q. Now, could you...demonstrate to the Court and the Jury just what the young man did?
>
> A. The bottle was held in this fashion here, holding it — instead of acting it up on the stage, Ms. Avery stood with her foot on each side of the chair facing him and then sat down in this area of his lap, and at this point I couldn't see whether the bottle was between the customer and her or what. Like I say, by this time, I'm off to their side.

Tr.1 at 105-106.

The petitioner's sole basis for impugning the constitutionality of Ordinance 248 is that its coverage is broader than the "few plain examples" of Miller. The Supreme Court has specifically rejected this notion. Jenkins, supra, at 160. As there was sufficient evidence that Ms. Avery's performance was within the proscriptions of Miller, her assault on the constitutionality of the Aberdeen Ordinance is an ineffectual basis for her habeas corpus petition.

D. The State's Failure to Produce Required Expert Testimony.

Ms. Avery's contention that the state was required to put on expert testimony is bottomed on a faulty conclusion reached through her misunderstanding of Paris Adult Theatre I v. Slaton,

413 U.S. 56 (1973). In Paris and other cases, the Supreme Court has held that expert testimony is unnecessary where the offensive material is introduced as evidence. 413 U.S. at 58. Ms. Avery posits the inverse that expert testimony is required where the material is not in evidence. Her contention has two fatal flaws.

First, the obscene "material" was put into evidence; in other words, there was descriptive testimony about the dance she performed. Absent a contemporaneous video recording of her performance, eyewitness accounts were sufficient evidence of her actions.

Second, her contention ignores the Supreme Court's advice that expert testimony is generally of little assistance in obscenity cases:

> This is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand. Cf. 2 J. Wigmore, Evidence §§ 556, 559 (3d ed. 1940). No such assistance is needed by jurors in obscenity cases; indeed the "expert witness" practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony. "Simply stated, hard core pornography...can and does speak for itself." We reserve judgment, however, on the extreme case, not presented here, where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest.

Paris, supra, n. 6 at 56 (internal citations omitted).

The presentation of expert testimony by the prosecution is neither mandated nor likely to be helpful to the jury in the routine obscenity case. Thus, the state's failure to provide such testimony is not a basis for habeas corpus relief.

E. The Circuit Court's Refusal to Permit the Testimony of Kenneth Haas.

Ms. Avery's next contention is that she was unconstitutionally deprived of her right to call witnesses on her behalf. This

contention rests solely on the circuit court's treatment of defense witness Kenneth Iman. The petitioner maintains that Iman sought to testify both as a lay and expert witness. The trial court refused to permit Iman to testify. The witness holds an associate degree in mental health (a two-year course of study) and the following proffer was made by the petitioner's counsel:

> MR. MILES: The proffer is two-fold: number one, I offer him as an expert in the field of mental -- as a practical mental hygienist; as an expert with regards to that for the purpose of showing that the State's case, even taking everything as being true, in terms of his field of expertise, has scientific value; number two, I feel I have more than qualified him as an expert to do that, in terms of giving an expert opinion of scientific value of the performances as indicated by the State's case only; number three, of course, the cases deal with this, and I'll point out, secondarily, do not require the person be expert at all. They can give an opinion based on being offensive.

Tr. I at 204-205.

Later, counsel for the petitioner restated the purposes for which Iman's testimony was offered:

> MR. MILES: Before I renew my motion, your Honor, I want to again present that I tried to present the testimony of Mr. Iman. The Court ruled I couldn't.
>
> Now, obviously, the reason I didn't question him further was because of the Court's ruling. It was my desire to have him testify on the scientific value of the performance and standards of the community would be violated or lacking with regards to the statute.

Transcript of May 16, 1979 ("Tr. I") at 3.

Maryland evidentiary law quite clearly permits the exclusion of expert testimony on subjects that are comprehensible by a jury of average intelligence. Patterson v. City of Baltimore, 130 Md. 645, 101 A. 589 (1917). As the Supreme Court, in Paris, supra, has held that expert testimony is not necessary in an obscenity case, the circuit court's exclusion of Iman's expert testimony was proper.

The petitioner contends here that Imam was also prepared to give lay testimony about the appropriate community standard. The prosecuting attorney noted an obvious defect in Imam's proposed testimony: "He has no experience, from what I hear from any of the people in Harford County, attending a particular place of business." Tr. 1 at 306.

Such lay opinion testimony about the appropriate community standard was properly excluded. See Williams v. New York, P. & N. R. Co., 153 Md. 102, 137 A. 306 (1927) (testimony of abstract character, of which jury is probably equally as well informed as witness, may be excluded).

It should be noted that the circuit court permitted Ms.Avery to put on a factual witness whose testimony contradicted the state's witnesses. Thus, the jury was presented with opposing testimony upon which the ultimate determination of obscenity vel non could be reached.

F. The Propriety of Ms. Avery's Sentence.

Finally, Ms. Avery contends that she was improperly sentenced by the state circuit court because that court merely affirmed the sentence imposed by the state district court. The rationale of her argument is that a de novo circuit court disposition must differ from that imposed at the district court level. To state her position is to demonstrate its flaws. It is clear that she was indeed resentenced and the sentencing judge stated an acceptable reason for his sentence:

> THE COURT: Do you have anything to say before I impose sentence?
>
> MS. AVERY: No. I don't.
>
> THE COURT: All right. Well, I'm going to impose the same sentence that has been imposed at the District Court, which I believe is ten days incarceration in the Harford County Detention Center, plus a hundred dollars fine, plus costs.

* * *

> THE COURT: Now, I'm imposing this sentence -- I fully recognize that the crime for which you've been convicted is not a particularly serious one, and I have no information to the effect that you're a vicious or bad person but -- and some people might contend that this was what's known as a victimless crime, if there is such a thing as victimless crime, but I feel that the people of Aberdeen have the right, within constitutional limits, to have some control over the tone of the community in which they live, and this includes, again within constitutional limits, the right to regulate the type of entertainment that takes place there. And in a small town like Aberdeen, you can't set aside a particular area for a particular type of entertainment, like the Baltimore block or New York City and so forth. So I feel that the town is within their rights in setting this sort of a penalty, whether one agrees with it or not, and that those rights should be taken seriously.
>
> So consequently, I'm imposing a jail sentence of ten days.

Tr. 2 at 61-62.

The general rule governing this Court's review of a sentence imposed by a state court is clear: "the federal courts have no right to review any sentence of a state court which does not exceed the statutory maximum sentence which may be imposed under the laws of the state." Stevens v. Warden, Maryland Penitentiary, 382 F.2d 429, 433 (4th Cir. 1967), cert. denied, 390 U.S. 1031 (1968) (even a shocking sentence is constitutionally unassailable if sentence does not exceed statutory maximum).

As the record reveals an ascertainable, and lawful, exercise of the circuit court's discretion, it is not a basis for habeas corpus relief. See United States v. Wilson, 430 F.2d 495, 498 (4th Cir. 1976).

III. CONCLUSION

As the petitioner raises no constitutionally meritorious grounds for habeas corpus relief, the petition will be denied.

Accordingly, it is this 12 day of November, 1998, by the United States District Court for the District of Maryland.

ORDERED:

1. That the Petition of Susan June Avery for Habeas Corpus relief shall be, and the same is hereby, DENIED;

2. That the Clerk of the Court shall prepare an Order entering judgment for the Respondents; and

3. That the Clerk of the Court shall mail copies of this Memorandum and Order to all parties.

Joseph C. Howard
United States District Judge

JUDGMENT ON DECISION OF THE COURT — CIV 40 (1-68)

United States District Court

FOR THE

DISTRICT OF MARYLAND

SUSAN JUNE AVENT,
Petitioner

v.

STATE OF MARYLAND, and LT. E. L. RECTOR, Harford County Detention Center,
Respondents

CIVIL ACTION FILE NO. JH-79-1343

JUDGMENT

This action came on for ~~trial~~ (hearing) before the Court, Honorable Joseph C. Howard, United States District Judge, presiding, and the ~~issues~~ having been duly ~~tried~~ (heard) and a decision having been duly rendered.

It is Ordered and Adjudged that the Petition for Writ of Habeas Corpus, in accordance with the Memorandum and Order of the Court dated November 13th, 1980, be and the same hereby IS DENIED.

Dated at Baltimore, Maryland ---------- this ----17th--- day of November ----, 1980.

PAUL R. SCHLITZ

Clerk of Court

by: Louis B. Curran

Louis B. Curran
Deputy Clerk of Court

SUSAN JUNE AVERY

v.

STATE OF MARYLAND

IN THE

COURT OF APPEALS

OF

MARYLAND

Petition Docket No. 114

September Term, 1979

(Ct. App. No. 1418 - Circuit Court for Harford County)

ORDER

Upon consideration of the petition for a writ of certiorari to the Circuit Court for Harford County in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

June 22, 1979.